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Concluding the WTO services negotiations on domestic regulation – hopes and fears

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Abstract: The negotiations under the aegis of the World Trade Organization (WTO) on the creation of rules on domestic regulations affecting trade in services have entered a critical stage. Within a general atmosphere of reflection and reluctance characterizing the Doha negotiations, this is the only front in recent years in which tangible progress is evident. This paper critically analyses the potential rules that Members currently appear to support and attempts to identify their shortcomings as well as those modifications or clarifications which are necessary to improve the impact and efficacy of the forthcoming rules (so-called ‘disciplines on domestic regulation’ in the parlance used in the General Agreement on Trade in Services – GATS). At the heart of the paper lies a thought-provoking proposal for a necessity test applicable across services sectors. Arguably, only a necessity test can allow for the elimination of unnecessary barriers to trade in services and regulatory arbitrariness.

1. Introduction

The General Agreement on Trade in Services (GATS) is a highly incomplete contract.¹ The obligations enshrined therein were drafted in an ambiguous manner, whereas their scope has remained unclear in the absence of any substantial effort by the WTO legislative to clarify it after the Uruguay Round.² This is all the more striking in the case of GATS obligations relating to domestic regulation.³ Such a constellation inevitably gives a more prominent role to the WTO adjudicating

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1 On the incompleteness of the WTO agreements, see H. Horn, G. Maggi, and R. Staiger, ‘Trade Agreements as Endogenously Incomplete Contracts’, NBER Working Paper No. 12745, December 2006; and S. Schropp, *Trade Policy Flexibility and Enforcement in the WTO – A Law and Economics Analysis* (Cambridge University Press, 2009), Chapter 3.

2 Sectoral initiatives such as those on financial, telecommunications, and accountancy services are the notable exceptions.

3 Under the GATS jargon, domestic regulation relates to national measures that are aimed to ensure the quality of the service supplied and which do not discriminate (and thus do not fall under the national treatment obligation of Art. XVII GATS) or constitute quantitative limitations (and thus do not come under the market access obligation of Art. XVI GATS).

bodies. However, harnessing regulatory diversity in trade in services through adjudication is becoming increasingly challenging and controversial, as the *US–Gambling* saga⁴ amply demonstrated. Whereas coming to grips with origin-neutral measures that protect domestic interests was one of the objectives of the Uruguay Round, compliance with this duty becomes daunting due to the fact that trade-restrictive effects are typically generated by origin-neutral regulatory measures.

The condemnation by international courts of *non-discriminatory* domestic measures brings about varying reactions from domestic circles, as it challenges anachronistic views about sovereignty and state prerogatives. There may be several ways to properly address these criticisms nowadays.⁵ Nevertheless, like any international court, the WTO adjudicator (the agent) meets the expectations of the WTO Members and indirectly their citizens (the principals)⁶ and adequately completes the WTO contract if it chooses the path of consistency, legal coherence, detailed argumentation, and sophisticated judicial reasoning.⁷ In so doing, it should properly take into account the balance established in the WTO Agreements ‘between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves’.⁸

4 At issue was a total prohibition, imposed by the United States, of the remote (including cross-border) supply of gambling and betting services. The dispute attracted the interest of many authors who expressed diverging views on the rightness of the Appellate Body ruling. See, *inter alia*, J. Pauwelyn, ‘*Rien ne Va Plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS*’, *World Trade Review*, 4(2) (2005), 131; P. Delimatsis, ‘Don’t Gamble with GATS – The Interaction between Articles VI, XVI, XVII and XVIII GATS in the Light of the *US–Gambling* Case’, *Journal of World Trade*, 40(6) (2006), 1059; P. Mavroidis, ‘Highway XVI Re-visited: The Road from Non-Discrimination to Market Access in the GATS’, *World Trade Review*, 6(1) (2007), 1. That the measure at issue was indeed a protectionist, self-defeating one was later proven during the Article 21.5 DSU proceedings. See Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Recourse to Article 21.5 of the DSU by Antigua and Barbuda (US–Gambling (Article 21.5 – Antigua and Barbuda))*, WT/DS285/RW, adopted 22 May 2007, DSR 2007:VIII, 3105, paras. 6.31, 6.126, 6.130–6.135.

5 See, generally, J. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (Cambridge University Press, 2006); also K. Raustiala, ‘Rethinking the Sovereignty Debate in International Economic Law’, *Journal of International Economic Law*, 6(4) (2003), 841.

6 K. Alter, ‘Agents or Trustees? International Courts in their Political Context’, *European Journal of International Relations*, 14(1) (2008), 33.

7 For an economic viewpoint regarding judicial completion of the contract, see G. Maggi and R. Staiger, ‘On the Role and Design on Dispute Settlement Procedures in International Trade Agreements’, NBER Working Paper No. 14067, 2008.

8 Appellate Body Report, *EC – Measures Concerning Meat and Meat Products (EC–Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, para. 115. The WTO adjudicating bodies form a sort of epistemic community which appears to be fully aware of its mission. Cf. Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico (US–Stainless Steel (Mexico))*, WT/DS344/AB/R, adopted 20 May 2008, paras. 160–161 and fn 313; also J. Bacchus, ‘Leaky’s Circle: Thoughts from the Frontier of International Law’, Address to the Institute of Advanced Legal Studies, University of London, 10 April 2003, p. 7, quoted in A. Cortell and S. Peterson, ‘Dutiful Agents, Rogue Actors, or Both? Staffing, Voting Rules, and Slack in the WHO and WTO’, in D. Hawkins, D. Lake, D. Nielson, and M. Tierney, *Delegation and Agency in International Organizations* (Cambridge: Cambridge University Press, 2006), p. 274.

Again, this does not alter the fact that constructive ambiguity, which has been the drafting method *par excellence* throughout the history of the GATT and the WTO,⁹ leaves the WTO adjudicator with little guidance as to the collective preferences of the WTO Membership. Absent any precise guidance from the WTO legislative and executive branch, which the judicial branch could utilize, the identification of the common intention of Members regarding a given issue can only be based on judicial constructions, which inevitably cannot satisfy the interests of every single WTO Member.¹⁰

Just as is the case with domestic courts, for the successful accomplishment of their delicate mission, the WTO adjudicating bodies cannot but use ‘proxies’. By proxies we understand those objective elements (e.g. legal principles, international standards, and so on) that can be used to enlighten the uninformed party (i.e. the judiciary) as to the intent of the regulating Member and thus ensure equality of competitive opportunities among the service suppliers active in a given market, while respecting that Member’s regulatory autonomy. Notably in the case of origin-neutral measures, which purportedly aim to guarantee a certain level of quality in the delivery of services, the WTO adjudicator has to be particularly vigilant in the examination of the facts at issue and their legal characterization. It is exactly in such difficult cases that the use of proxies is warranted, as they typically serve to reach a reasonable conclusion, even when based on limited evidence.¹¹

The use of proxies allows for informed judgments and adds to the legitimacy and acceptability by the WTO Members of these judgments, simply because Members themselves have agreed on their validity and their important guiding function that they can overall play. The principles of necessity and transparency, together with the use of international standards, are the most important legal instruments or yardsticks that the WTO drafters bestowed upon the Panels and the Appellate Body to allow for the detection of regulatory arbitrariness and

9 As Howse and Nicolaidis argue, this type of ambiguity has ‘merely served to delay confronting hard questions’. See R. Howse and K. Nicolaidis, ‘Legitimacy through “Higher Law”? Why Constitutionalizing the WTO Is a Step Too Far’, in T. Cottier and P. Mavroidis (eds.), *The Role of the Judge in International Trade Regulation – Experience and Lessons for the WTO* (Michigan University Press, 2003), p. 317.

10 Cf. among manifold examples, the interpretation of the Schedules of Commitments in the *US–Gambling* case or the acceptance of amicus curiae briefs in the *US–Shrimp* case. One should add to this the practical problems that Panels and the Appellate Body have to tackle. These problems are associated with the increasing workload and the lack of coordination among parties, or the fact that sometimes evidence is submitted and claims are raised at an advanced stage of the process. Cf. Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products (EC–Biotech)*, WT/DS291/R, WT/DS292/R, WT/DS293/R, Add.1 to Add.9, and Corr.1, adopted 21 November 2006, DSR 2006:III–VIII, 847, paras. 7.37–7.45.

11 For instance, the disparate impact of a legislation has been regarded by the US Supreme Court as a proxy for intent to discriminate. See R. Primus, ‘The Future of Disparate Impact’, *Michigan Law Review*, 108 (2010, forthcoming). The European Court of Justice (ECJ) has also adopted a similar reasoning in cases relating to the fundamental freedoms of free movement, for instance by striking down residency requirements, as they have a heavier impact on non-nationals. See, among others, C-145/99, *Commission v Italy* [2002] ECR I-2235.

protectionist abuse. This emergence of proxies during the Uruguay Round was deemed necessary in view of Members' determination to shift their interest from non-discrimination to bringing some discipline to origin-neutral measures that may have deleterious effects on trade, as they could substantially undermine market access commitments. The obligations enclosed in several WTO agreements and notably the Agreement on Technical Barriers to Trade (TBT), the Agreement on Sanitary and Phytosanitary Measures (SPS), and the GATS fully manifest this determination.

Now that the WTO negotiations on domestic regulation in services have taken a critical turn, this paper aims to make a clear and thought-provoking case for the efficient incorporation of the principles of necessity and transparency into the forthcoming regulatory disciplines on domestic regulation. These principles constitute the most important 'protectionism revelation' proxies.¹² The paper argues for the inclusion in the final text of disciplines that give flesh to these proxies. This is necessary, not only for the sake of loyalty to their previous commitments, but also in order to improve the quality and trade-responsiveness of their domestic regulations in services. This is particularly relevant for the principle of necessity and the so-called necessity test which appears to be one of the most controversial issues under discussion in the current services negotiations.¹³

Section 2 describes the framework within which Members negotiate the content of the rules on domestic regulation and the challenges that they face. Section 3 critically discusses the most recent Draft rules on domestic regulation, their novelties, and their shortcomings. Based on the wording of the GATS and the proposals advanced to date as to the most adequate protectionist revelation test, Section 4 puts forward a possible framework for such a test that is likely to attract considerable support among Members, whilst Section 5 explains why the application of a necessity test by the WTO adjudicator is inevitable. Last, but not least, Section 6 tackles a few practical issues, which, if not carefully considered, could render the forthcoming rules dead letter. Section 7 concludes.

2. Tackling non-discriminatory regulatory conduct in services at a global level – the long and winding road

Since regulatory intensity and diversity is the common theme in manifold services sectors, and border measures are essentially inapplicable in the case of trade in services, 'within-the-border' domestic regulations that are unduly burdensome are targeted as the most restrictive potential barriers to trade in services.¹⁴ The WTO in

12 See WTO, Council for Trade in Services, 'Article VI:4 of the GATS: Disciplines on Domestic Regulation Applicable to All Services', Note by the Secretariat, S/C/W/96, 1 March 1999, p. 4.

13 WTO, WPDR, 'Report of the Meeting Held on 1 April 2009', S/WPDR/M/40.

14 P. Delimatsis, 'Due Process and "Good" Regulation Embedded in the GATS – Disciplining Regulatory Behaviour in Services through Article VI of the GATS', *Journal of International Economic Law*, 10(1) (2007), 15–17.

general does not interfere with Members' regulatory sovereignty and this is expressed in no uncertain terms. In the GATS, this is made most obvious in the structure of the agreement: while measures limiting market access or violating national treatment are explicitly prohibited in sectors where commitments were undertaken unless scheduled, the right to maintain or introduce origin-neutral measures aimed at quality assurance is upheld and Members are not required to eliminate such measures. Nevertheless, economic theory suggests – and practice has shown – that Members always have a short-term incentive to 'cheat' while their trading partners comply with their WTO obligations.¹⁵ Such measures, because of the a priori WTO deference towards regulatory autonomy, are the 'ideal' gateway for a Member to substantiate its intention to circumvent the WTO obligations. Therefore, rules governing such measures have to be agreed on if market access guaranteed through specific commitments is to be effective.

In the Uruguay Round, the GATS drafters failed to agree on the content of an instrument that would allow the minimization of the negative impact on trade of regulatory conduct. At the end of that Round, negotiators fell short of concluding the legal framework in four areas of rulemaking, that is domestic regulation, emergency safeguards, government procurement, and subsidies. These areas constitute the 'built-in' agenda for the ongoing services negotiations that began in early 2000.

As to domestic regulation, notably Article VI:4 GATS incorporates a legal mandate by requiring that Members adopt the necessary rules (so-called 'disciplines') that would ensure measures relating to qualification requirements and procedures (QRP), licensing requirements and procedures (LRP), and technical standards (TS) are, *inter alia*, (a) based on objective and transparent criteria, (b) not more burdensome than necessary to ensure the quality of the service, and (c) with respect to procedures, not in themselves a restriction on the supply of a given service. Priority was given to professional services and the Working Party on Professional Services (WPPS) was thereby established. The WPPS completed its task by developing disciplines on domestic regulation in the accountancy sector in December 1998.¹⁶ In May 1999, the Council for Trade in Services (CTS) established the Working Party on Domestic Regulation (WPDR), which assumed the work of WPPS and is charged with the development of meaningful and coherent disciplines on domestic regulation, which would be horizontally applicable (i.e. across services sectors). Through this legal mandate, Members are required to restore the balance between the three prongs leading to effective market access (i.e. GATS Articles XVI, XVII, and VI) and establish regulatory disciplines

15 P. Delimatsis, *International Trade in Services and Domestic Regulations – Necessity, Transparency, and Regulatory Diversity* (Oxford University Press, 2007), p. 41.

16 WTO, Trade in Services, 'Disciplines on Domestic Regulation in the Accountancy Sector', S/L/64, 17 December 1998.

for measures relating to QRP, LRP, and TS, including the procedures for enforcing these standards ('the covered measures').

Domestic regulation is the only area of rulemaking where tangible progress has been witnessed during the ongoing round of services negotiations. Again, this is not a coincidence, but an informed decision by Members to advance this agenda item even with a rather apparent lack of enthusiasm for achieving progress in the other negotiating areas at present.¹⁷ Absent border barriers in services trade, the effectiveness of the rules on domestic regulation in services at the global level determines the effectiveness of the GATS overall.

It also bears mention that, in their preferential trade agreements (PTAs), most Members usually entrust the concretization of rules on domestic regulation to the WTO. In the overwhelming majority of PTAs, even if liberalization in other areas may be substantial,¹⁸ the negotiating parties find it intractable to go beyond Article VI GATS when bilateral discussions focus on domestic regulation. In this case, after essentially reproducing the wording of Article VI GATS in their bilateral accord, they incorporate a clause which requires them to revise their discipline on domestic regulation in services, based on the results of the negotiations under the aegis of the WPDR. PTAs such as those between the United States and Singapore,¹⁹ the United States and Chile,²⁰ Australia and Singapore,²¹ or the European Free Trade Association (EFTA) and Chile²² highlight this trend.²³ The semantics are clear: Members recognized that collective action by means of multilateral cooperation was the only avenue suitable to address the issues raised in an efficient and least trade-distorting manner. In an era of increasing preferentialism in trade relations, this explicit, 'against-the-preferential-odds' delegation at the multilateral level challenges conventional wisdom about the superiority of PTAs in terms of rule-making and instead demonstrates the limits of preferential solutions in several areas. It further confirms the extant attractiveness of the WTO as the only forum that can achieve the application of certain rules across the board.

17 Anecdotal evidence suggests that a recent attempt by a Member representative to link further progress in the negotiations on domestic regulations to advancements in agriculture and NAMA was fiercely criticized. However, in the recent Ministerial Conference held in Geneva in December 2009, several Members suggested that progress in services should go in tandem with other negotiating areas.

18 This, again, will often depend on the bargaining power of the parties involved (for instance US PTAs tend to deliver more substantial results) or the level of ambition and the sectoral interests of the parties involved. See C. Fink and M. Moliuevo, 'East Asian Preferential Trade Agreements in Services: Liberalization Content and WTO Rules', *World Trade Review*, 7(4) (2008), 641. Also J. Marchetti and M. Roy (eds.), *Opening Markets for Trade in Services – Countries and Sectors in Bilateral and WTO Negotiations* (Cambridge University Press, 2009).

19 Art. 8.8:3 of the US–Singapore PTA.

20 Art. 11.8:3 of the US–Chile PTA.

21 Art. 7-11.5 of the Singapore–Australia FTA.

22 Art. 28 EFTA–Chile FTA.

23 Such PTAs also tend to require that PTA partners coordinate in these multilateral negotiations within the WPDR.

At the Hong Kong Ministerial Conference in December 2005, Members pledged to agree on a text that would incorporate concrete regulatory disciplines on *non-discriminatory non-quantitative* domestic regulations before the end of the current negotiating round.²⁴ Members currently negotiate within the WPDR based on a draft text and subsequent revisions prepared by the WPDR Chair and circulated in the form of room documents. This secrecy is just another element reminiscent of the delicate phase that negotiations on domestic regulation have entered. Regulatory capture is just around the corner and domestic services industries do not seem to have realized the full potential of the forthcoming disciplines.

The importance and ground-breaking nature of the forthcoming disciplines is obvious: adherence to these disciplines when regulating the supply of services through origin-neutral measures would reflect the *minimum* level of protection and transparency from which service suppliers benefit globally.²⁵ Once the forthcoming disciplines are adopted, service suppliers will be benefiting from rights that were not previously available to them – sometimes not even in their home countries. The creation of these disciplines constitutes a tentative endeavour by WTO Members to move away from the traditional negative integration approach and achieve positive integration, at least as regards those measures affecting trade in services which relate to qualifications, licensing, and technical standards.

Additionally, *post-Doha* the completion of the Article VI:4 mandate will bring about national regulatory audits to ensure compliance with the ensuing regulatory disciplines. This ‘screening’ exercise will facilitate trade by inducing domestic regulatory reforms at all levels of government and by improving regulatory quality. It will also promote informal forms of regulatory cooperation among domestic regulators and lead to minimum harmonization of domestic regulations, which aim to ensure the quality of the services supplied. In the medium term, Members will be identifying similarities between their regulatory systems in certain services sectors and be aware of the costs of maintaining a rigid stance towards foreign suppliers.

Thus, the GATS promotes a managed approximation of laws which will generate strong and justified pressures for mutual recognition agreements (MRAs).²⁶ The repercussions are paramount: this regulatory programme under construction at the global level will be infused into domestic counterparts. The adoption of

24 Annex C to the Hong Kong Ministerial Declaration, adopted on 18 December 2005, WT/MIN(05)/DEC, para 5.

25 In the case of intellectual property rights, Part III of the TRIPS Agreement also incorporates enforcement procedures which ‘provide for an internationally-agreed minimum standard which Members are bound to implement in their domestic legislation’. See Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998 (US–Section 211 Appropriations Act)*, WT/DS176/AB/R, adopted 1 February 2002, DSR 2002:II, 589, paras. 206–7, 221.

26 Viewed from this angle, Article VI complements and serves the object and purpose of Article VII GATS. See, generally, A. B. Zampetti, ‘Market Access through Mutual Recognition: The Promise and Limits of GATS Article VII’, in P. Sauvé and R. M. Stern (eds.), *GATS 2000: New Directions in Services Trade Liberalization* (Brookings Institution, 2000), pp. 283–306.

procedural and substantive norms at the global level will increasingly constrain the margin of manoeuvre of domestic regulators when regulating domestically. The latter will no longer be merely national actors, but will have to assume an additional role as agents of the GATS rules on domestic regulation to ensure compliance and uniform application of these rules in all Members.²⁷ This global regime is aimed to protect the interests and concerns of other Members and foreign service suppliers by ensuring the compliance of domestic regulators with these globally applicable rules. In this respect, ensuring effective enforcement at the domestic level becomes crucial, as explained in Section 6.

3. The draft disciplines on domestic regulation²⁸

Members' sovereign prerogative to regulate and to introduce new regulations on the supply of services to pursue legitimate objectives is explicitly recognized in the GATS Preamble and in paragraph 3 of the draft disciplines on domestic regulation.²⁹ The disciplines are neutral as to the regulatory approach chosen, leaving ample scope for domestic regulators. Nevertheless, regulatory discretion is not unlimited; rather, it is circumscribed by Article VI:4, which considers the creation of effective, enforceable, and operationally useful regulatory disciplines, an apposite remedy against Members' incentives to circumvent multilateral obligations. Through the adoption of regulatory disciplines pursuant to Article VI:4, the GATS essentially aims to facilitate drawing the line of equilibrium between multilateral interest in progressive liberalization of trade in services and each Member's interest in preserving its regulatory autonomy.³⁰

The disciplines constitute the first serious attempt, as well as a unique opportunity, to concretize the primary GATS objective and to achieve it in certain categories of domestic regulations relating to qualifications, licensing, and technical standards. In what follows, we will proceed to a presentation of the most important aspects of the proposed disciplines on domestic regulation. In the second part of this section, we will attempt a first critical assessment of the disciplines and suggest several effective ways to improve the proposed disciplines on domestic regulation. In these efforts, we draw several lessons from the European Union's recent initiative for better regulation and simplification of procedures in legislating the internal market of services, i.e. the infamous Services Directive.³¹ Finally, we conclude this section with a critical evaluation of the development provisions of the disciplines.

27 A.-M. Slaughter, *A New World Order* (Princeton University Press, 2005).

28 Our comments are based on the most recent draft text submitted by the WPDR Chairman. See WPDR, 'Disciplines on Domestic Regulation Pursuant to GATS Article VI:4', Room Document, 20 March 2009 (on file with the author).

29 This right forms part of the object and purpose of the GATS. See Panel Report, *US-Gambling*, paras 6.107–9 and 6.314–17.

30 cf. Panel Report, *US-Gambling*, para. 6.316.

31 Directive 2006/123 on services in the internal market (the Services Directive) [2006] OJ L 376/36.

3.1 *An analysis of the draft disciplines on domestic regulation – focus on improving procedures*

The Draft incorporates regulatory disciplines that aim to enhance the objectivity and transparency of domestic measures relating to licensing, qualifications, and standards and ensure observance of contemporary dictates of due process in the domestic regulatory making. Its scope is limited to measures that affect trade in services in committed sectors.³² Additionally, it attempts to draw the line between Article VI measures and measures falling under Articles XVI and XVII. While the latter escape the purview of the disciplines, the manner in which Members *administer* (or apply)³³ these measures would still be subject to the disciplines.³⁴ Furthermore, the Draft requires that the covered measures be *pre-established*, based on *objective* and *transparent* criteria, and *relevant to the supply* of the service to which they apply. This provision hints at the overall objective of the draft disciplines to limit the otherwise broad regulatory authority of Members, avert regulatory arbitrariness and unnecessary bureaucracy, and ensure the creation or preservation of a stable, predictable and trade-friendly regulatory environment for service suppliers.

Depending on the category of measures at issue, the level of detail varies. The overall structure and content of the Draft reveals Members' willingness to focus on the development and adoption of a workable set of global rules relating to procedural issues when it comes to domestic regulations affecting trade in services. The procedural novelties in the disciplines are significant and accord with the overall contemporary trend of growing engagement with good governance principles, such as transparency, participation, reasoned decision, availability of legal remedies, and review.³⁵ The procedural disciplines of the Draft are the most refined and call for the simplification and streamlining of the applicable procedures to ensure that they do not constitute in themselves a restriction on the supply of services.³⁶ In this sense, the draft disciplines elaborate on the procedural obligations set out in Articles III and VI GATS.

3.1.1 *Procedural and regulatory transparency*

The Draft contains fairly detailed provisions that streamline and guarantee transparent application processes. Furthermore, the Draft requires that Members publish, or make otherwise publicly available, detailed information regarding the

32 This limitation of the coverage of the disciplines goes against the letter of Article VI:4. See Delimatsis, above n. 15, pp. 187–189.

33 Cf. Appellate Body Report, *European Communities – Selected Customs Matters* (EC–Selected Customs Matters), WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, 3791, paras. 224–6.

34 Cf. WTO, Council for Trade in Services (Special Session), 'Economic Needs Tests', Note by the Secretariat, S/CSS/W/118, 30 November 2001, para. 7.

35 Cf. B. Kingsbury, N. Krisch, and R.B. Stewart, 'The Emergence of Global Administrative Law', *Law and Contemporary Problems*, 68 (2005), 15.

36 Cf. Chapter II of the EU Services Directive on 'administrative simplification'.

covered measures. This information will, *inter alia*, relate to the procedures to be followed or the timeframe for processing of applications, but also to the legal content of the measures, such as licensing or qualification criteria. Such information need not be notified to the WTO, but only published promptly,³⁷ through printed or electronic means. The Draft foresees extending to any service supplier the use of enquiry and contact points created pursuant to Articles III and IV GATS in the aftermath of the Uruguay Round, and thus detailed information could flow through these points. To date, these government-to-government information points have barely been used, as those who are the most interested in receiving this type of information, that is the traders, do not have access to them.

The Draft, *inter alia*, urges countries to provide a single point of contact or competent authority to deal with a supplier's application (*one-stop-shops*), process applications, and administer application procedures and examinations in an objective manner, and to ensure the reasonableness of fees requested. In case an application for a licence or for assessment and verification of qualifications is dismissed, the authorities are required to inform the applicant in writing and without undue delay of this dismissal and the timeframe for an appeal against this decision. If requested to do so, the authorities have to explain the reasons that led to the dismissal of the application, and a service supplier should in principle be able to ascertain the reasons for a decision that has a negative affect.³⁸ This give-reason requirement is an essential good-governance obligation and diminishes authorities' leeway for making arbitrary or unreasonable decisions.³⁹

The amalgam of the transparency provisions contained in the forthcoming regulatory disciplines constitutes a critical building block underpinning the further liberalization of trade in services, as these provisions require regulatory reforms and help identify trade-restrictive measures. The disciplines will also lead to significant positive integration in the regulation of the covered measures and guarantee minimum levels of legal certainty and due process.

3.1.2 *Licensing and qualification requirements*

Regarding licensing requirements, the disciplines merely call upon Members to reflect on the need for using non-discriminatory residency requirements for licensing and the existence of other instruments which could attain the public policy objective pursued. This soft wording does not appear in the case of qualification requirements. Residency requirements as part of qualification requirements are treated more strictly, as they are ruled out if they are a precondition for

37 For an analysis of the 'prompt publication' concept, see P. Delimatis, 'Article III GATS', in R. Wolfrum, P.-T. Stoll, and C. Feinäugle (eds.), *Max-Planck Commentaries on World Trade Law, Volume 6: WTO – Trade in Services* (Brill Publishers, 2008), p. 97.

38 Cf. in the EU context, the landmark decisions on *Heylens* and *Vlassopoulou*. Case 222/86 *Unected v Heylens* [1987] ECR 4097, paras. 14–16; and C-340/89, *Vlassopoulou* [1991] ECR I-2357, para. 17.

39 Cf. Appellate Body Report, *US-Shrimp*, para. 183. The requirement to give reasons is also very useful for judicial review purposes. See M. Shapiro, 'The Giving Reasons Requirement', *University of Chicago Legal Forum* (1992), 179.

the assessment and verification of the competence of a given service supplier, unless they are scheduled as limitations to the national treatment obligation.⁴⁰ In more general terms, residency requirements have been discussed intensively first within the WPPS and later within the WPDR. Discussions suggest that there is no common rule of thumb as to when residency requirements can be regarded as national treatment limitations and thus need to be scheduled. The fact that rules on non-discriminatory residency requirements are included in the Draft is welcome, as it will greatly contribute to the elimination of one of the major barriers to international trade in services which service suppliers currently encounter.

Furthermore, the Draft is more detailed with regard to qualification requirements and calls for fair and flexible assessment of qualifications and professional experience. The disciplines also generalize Article VI:6 GATS to apply *across* services sectors. The latter provision, as it stands, applies only to professional services in which commitments were undertaken. In conducting this comparative examination of qualifications and experience, the competent authorities should satisfy themselves that the qualifications, including diplomas and practical training, are at least equivalent to those possessed by the national suppliers.⁴¹ Equivalence is not predicated upon the similarity of the different elements, but upon their comparability. For the sake of comparison, Article VI:6 in its current form has much more limited scope in that it does not explicitly impose any obligation other than the verification of competences, such as establishing the equivalence between home country and host country requirements.⁴² This can be one of the reasons for the current poor record of compliance with this obligation.

In the Draft, a prominent role is given to professional experience acquired as a complement to diplomas and other educational qualifications, as the competent authorities are required to take due consideration thereof when they verify the competence of the applicants. Thus, the Draft takes a pragmatic, business-friendly stance towards economic reality and mobility of human capital. The proposed disciplines go so far as to offer the possibility of fulfilling any additional educational requirements in the home country or in a third country.

3.1.3 *Licensing and qualification procedures*

Simplifying procedures relating to granting a licence or evaluating qualifications is one of the main objectives of the proposed disciplines, which endorse principles and rules found in modern administrative states in several instances. Complex procedures and manifold domestic authorities reviewing a single application by a service supplier usually dissuade mobility and thus hinder trade in services. The European

40 For a discussion on residency requirements, see Delimatsis, above n. 15, pp. 195–196.

41 Cf. C-31/00, *Dreessen* [2002] ECR I-663, para. 24. A landmark case as to how such a comparison can occur in practice in an EU Member State is the ECJ judgment of 10 December 2009 in the case C-345/08, *Pešla* (not yet published).

42 See WTO, Council for Trade in Services, above n. 12, p. 3; also Delimatsis, above n. 14, pp. 47–48.

Union (EU) experience is revealing:⁴³ Within its Lisbon Strategy, it undertook several steps to simplify and improve existing legislation (*acquis communautaire*), to better design new regulation, and to reduce administrative and other burdens by regularly contacting regulatory impact assessment.⁴⁴ The EU 'Better Regulation Initiative' is considered as central in completing the internal market.⁴⁵

The Draft requires that the competent authorities enforcing licensing procedures be impartial, operationally independent of, and not accountable to any supplier of the services for which the licence is warranted. Due process and good governance are the principles that inform the disciplines relating to licensing and qualification procedures. The Draft advocates a streamlining and standardization of these procedures and the diminution of regulatory arbitrariness and unnecessary red tape and bureaucracy to the benefit of all service suppliers seeking to supply their services in foreign markets. Creating one-stop-shops and clearly defining the stages from the moment of application to the moment of administrative decision by the competent authority are two important requirements of the disciplines.

3.1.4 *Technical standards*

With respect to technical standards, the Draft clarifies that such standards also include the procedures relating to the enforcement of these standards. Furthermore, it requires that Members take into account relevant international standards, unless these would not achieve the national policy objective(s) pursued in an effective and appropriate manner. This provision echoes Article 2.4 TBT, the important difference being that under the TBT provision Members have an *obligation* to use such standards as a basis for their technical regulations. This provision is likely to replace Article VI:5(b) once the disciplines on domestic regulation are adopted.

Additionally, the Draft encourages Members to harness the behaviour of non-governmental bodies when they develop and apply domestic or international standards, thereby recognizing the increasingly important role that non-governmental standard-setting bodies can play in hindering access to the supply of a given service, even if the standards they develop are mostly of a voluntary nature.

3.1.5 *Institutional perspectives*

The Draft equally contains institutional provisions. A new Committee on Domestic Regulation is thereby created that will be responsible, not only for

⁴³ European Commission, 'Third Strategic Review of Better Regulation in the European Union', COM(2009)15, 28 January 2009.

⁴⁴ See, among others, Mandelkern Group on Better Regulation – Final Report, 2001, available at: http://ec.europa.eu/governance/better_regulation/documents/mandelkern_report.pdf.

⁴⁵ Similar initiatives have been launched earlier in other countries such as the US ('reinventing government') or Canada ('smart regulation'). The OECD has a multi-year programme on regulatory reform, which culminated in the 'OECD Guiding Principles for Regulatory Quality and Performance' adopted in 2005. In the same year, APEC and OECD agreed on an 'Integrated Checklist on Regulatory Reform'.

supervising the implementation of the prospective disciplines, but also for ensuring adherence to the other obligations of Article VI.⁴⁶ As a ‘double’ guarantee, the Council for Trade in Services shall also review the operation of the disciplines if one Member so requests.

3.2 *Critical assessment of the disciplines and scope for improvement*

3.2.1 *Procedural and regulatory transparency*

Transparency is a significant ‘protectionism revelation’ proxy. Enhanced transparency is an object and purpose not only of the GATS, but of the WTO in general.⁴⁷ WPDR discussions on transparency have been intense and effective, since several countries consider that this is one of the areas where rules applicable across services sectors would seem sensible.⁴⁸

Considering the potential administrative burden involved, the draft disciplines use hortatory, best-endeavour language to initially encourage Members to publish GATS Article VI:4-relevant measures in advance to enable service suppliers, both foreign and domestic, to comment. Additionally, Members are encouraged to address collectively in writing the substance of these comments.

Contrary to paragraph 6 of the draft accountancy disciplines, this ‘soft’ requirement for prior comment procedures concerns *all* measures of general application, and does not distinguish between measures that *significantly* affect trade in services and measures that do not. Prior notice and comment procedures applied at all levels of regulatory authority are conducive to the internationalization of decision-making and increase the legitimacy, accountability, representativeness, and – ultimately – acceptance of the proposed measures by the service suppliers.⁴⁹ While allowing foreigners to play a role in domestic regulatory making goes against conventional wisdom about sovereignty and may cause political tensions domestically, positive integration certainly presupposes a partial transfer of sovereign regulatory powers to a higher level of governance. Such a constellation may lead to an increase in transaction costs in the short run, as it requires that domestic authorities ensure the proper functioning of notice and comment procedures. However, transaction costs would most likely diminish in the medium to

46 For an analysis of these obligations, see Delimatsis, above n. 1.

47 Panel Report, *US–Gambling*, para. 6.107. Also Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear (US–Underwear)*, WT/DS24/AB/R, adopted 25 February 1997, DSR 1997:I, 11, p. 21; and Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China–Publications and Audiovisual Products)*, WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R, para. 7.1219.

48 WTO, WPDR, ‘Report on the Meeting Held on 22 June 2005’, S/WPDR/M/30, 6 September 2005, paras. 40ff.

49 J. Habermas, *The Theory of Communicative Action: Reason and the Rationalization of Society* (Beacon Press, 1981); D. Esty, ‘Good Governance at the Supranational Scale: Globalizing Administrative Law’, *Yale Law Journal*, 115 (2006), 1530.

long run, as the risk of litigation will also become less likely. This is so because prior notice and comment procedures can function as early warning systems and as conflict avoidance techniques because foreign suppliers can raise their objections at the point when any domestic regulation is drafted. Thus regulatory sovereignty should be understood as embedded within a new concept of cooperative sovereignty and responsibility in a post-national setting⁵⁰ that strives for a closer form of positive integration and minimum harmonization, which do give voice to all those affected by administrative decisions taken at all levels of governance.

Such procedures have been implemented at the national level in several countries and have improved the function of domestic regulatory processes. The EU experience of introducing and gradually reinforcing a ‘culture of consultation and dialogue’⁵¹ is instructive in this respect.⁵² Ensuring the coherence and consistency of the procedures that precede the adoption of legislation leads to the more active involvement of stakeholders and to more optimal regulatory results.⁵³ This is another example of the inspiration that international law draws from national jurisdictions.⁵⁴ The former borrows instruments from the toolbox of the domestic regulatory frameworks in place and transforms – or better, adjusts – them before crystallizing them into the form of an international obligation (in this case an obligation to offer procedural participation rights to foreign constituents and trading partners).⁵⁵ More generally, participation in international institutions can improve the functioning of domestic democracy by increasing openness, accountability, and transparency.⁵⁶

However, the lack of a provision in the Draft equivalent to Article 2.5 TBT and paragraph 5 of the draft accountancy disciplines requiring that Members, upon request, explain the rationale behind domestic measures and their connection to a

50 Viewed through this prism, the exercise of sovereignty becomes a collective and cooperative enterprise calling for an anthropocentric approach. Cf. S. Hobe, ‘Statehood at the end of the 20th Century – The Model of the “Open State”: A German Perspective’, *Austrian Review of International and European Law*, 2 (1997), 127.

51 European Commission (2001), ‘European Governance – A White Paper’, COM(2001)428. See also Art. 11:2 of the Lisbon Treaty. See, however, T-135/96, *UEAPME v Council* [1998] ECR II-2335.

52 Also C. Harlow, ‘Global Administrative Law: The Quest for Principles and Values’, *European Journal of International Law*, 17(1) (2006), 201. The EU adopts this stance in its external relations as well. See European Commission, ‘On the External Dimension of the Lisbon Strategy for Growth and Jobs: Reporting on Market Access and Setting the Framework for More Effective International Regulatory Cooperation’, COM(2008)874.

53 European Commission (2002), ‘Towards a Reinforced Culture of Consultation and Dialogue – General Principles and Minimum Standards for Consultation of Interested Parties by the Commission’, COM(2002)704.

54 Some EU law scholars would even argue for an incremental ‘Europeanisation’ of international law. See F. Snyder (ed.), *The Europeanisation of Law: The Legal Effects of European Integration* (Hart Publishing, 2000).

55 See S. Cassese, ‘Global Standards for National Administrative Procedure’, *Law and Contemporary Problems*, 68 (2005), 121.

56 R. Keohane, S. Macedo, and A. Moravcsik, ‘Democracy-Enhancing Multilateralism’, International Law and Justice Working Paper No. 2007/4, New York University.

legitimate objective weakens the ‘bite’ of the transparency provisions included in the draft disciplines. In the categories of measures covered by the disciplines where the scope of regulatory discretion is virtually unlimited, such a provision would significantly facilitate the distinction between necessary and unnecessary impediments to services trade. It would also facilitate the settlement of disputes, as it would shift the burden of proof to the regulating (i.e. responding) party. Even so, informal requests will in all likelihood be directed to the host countries when complaints are filed domestically, leading to consultations and, if necessary, to recourse to the dispute settlement proceedings.

3.2.2 *Licensing and qualification requirements*

As underscored earlier, the Draft merely calls upon Members to reflect on the need for using non-discriminatory residency requirements for licensing. Residency requirements are, however, treated more strictly when they relate to qualification requirements, as they are ruled out if they are a precondition for the assessment and verification of the competence of a given service supplier unless they are scheduled as limitations to the national treatment obligation.⁵⁷

This obligation, as it is drafted now in the section of the Draft relating to qualification requirements, begs the question of whether the use or existence of residency requirements overall is practically precluded. In addition, it is not clear whether residency can be a prerequisite for sitting examinations. In the draft accountancy disciplines, the text states in no uncertain terms that this is not allowed.⁵⁸ It would be helpful if Members were to clarify this provision to also outlaw any residency requirements for sitting examinations. For instance, the EU Services Directive is clearer in this respect in considering as prohibited any requirement that service suppliers be resident within the territory.⁵⁹

With regard to equivalence of qualifications, the Draft essentially excludes the possibility for domestic authorities to request full requalification of service suppliers, seeking the recognition of equivalence of their qualifications. Thus, the Draft goes far beyond the highly unsatisfactory provision relating to equivalence contained in paragraph 19 of the draft accountancy disciplines and thus demonstrates the level of maturity reached within the negotiating group (the WPPS and later the WPDR) dealing with the Article VI:4 negotiations since the end of the Uruguay Round. According to the Draft, professional experience and other qualifications should be evaluated and compensate for a possible deficiency of academic qualifications. This liberal approach should be applauded. Nevertheless, the Draft does not echo the far-reaching obligations contained in Articles 4.1 SPS or 2.7 TBT according to which (albeit in the TBT in a somewhat smoother

⁵⁷ For a discussion on residency requirements, see Delimatsis, above n. 15, pp. 195–196.

⁵⁸ See WTO, Trade in Services, above n. 16, para. 24.

⁵⁹ See Art. 14:1(b) of the EU Services Directive. However, this prohibition is a corollary of the different approach that the EU adopts, which is based on achieving an internal market of services.

manner) Members are required to accept the measures of SPS or TBT measures of other Members as being equivalent to their own, even if they differ. Pursuant to Article 4.1 SPS, the importing Member has to accept such equivalence if the exporting Member can demonstrate that the attainment of the desired level of protection domestically is ascertained. Article 2.7 TBT, however, suggests that 'positive consideration' shall be given to accepting equivalence, unless the importing Member believes that such measures do not adequately attain the objectives of their own measures. In this case, it appears that the burden of proof will be on (or at least easily shift to) the importing Member. Members may want to consider these TBT and SPS provisions in the specific case of technical standards.

As a last point, it is worth mentioning that the case for horizontal – as opposed to sectoral – disciplines on domestic regulation is even stronger when it comes to qualification requirements and procedures. In the EU context, early sectoral attempts failed to achieve the desired liberalization and to enhance mobility of service suppliers. This changed with the adoption of a general system for the recognition of qualifications around the early 90s.⁶⁰

3.2.3 *Licensing and qualification procedures*

A significant novelty of the draft is the creation of one-stop-shops. This requirement will facilitate mobility of service suppliers, especially in federal countries where competences were earlier distributed along the various levels of government. Added value is also evident in those cases where the point of contact is also the authority directly competent to issue the documents necessary for the supplier to access a service activity.

The provisions of the Draft on licensing and qualification procedures build on the existing transparency obligations within the GATS as well as on Article VI:2. According to the Draft, the competent authorities enforcing the licensing procedures are explicitly required to be impartial, operationally independent of, and not accountable to any supplier of the services for which the licence is warranted. Surprisingly, however, this obligation does not apply to the domestic authorities in charge of verifying and assessing qualifications. This omission is inexplicable and creates unnecessary confusion regarding the motives of the drafters. Operational impartiality and independence of the competent domestic authorities administering domestic qualification procedures seem to be equally essential, as in the case of licensing procedures. Consider, for instance, a committee, composed exclusively of domestic lawyers, verifying qualifications of lawyers. The danger of prejudiced and negative decisions appears to be relatively high.⁶¹ In this case, one would

⁶⁰ The EU rules relating to the recognition of professional qualifications are now contained in the Directive 2005/36, OJ L 255/22. Also C. Nicolaidis, 'Globalization with Human Faces: Managed Mutual Recognition and the Free Movement of Professionals', in F. Schioppa (ed.), *The Principle of Mutual Recognition in the European Integration Process* (Palgrave, 2004).

⁶¹ Cf. Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather (Argentina–Hides and Leather)*, WT/DS155/R and Corr.1, adopted 16 February 2001,

expect that other experts such as judges, prosecutors, and civil servants from the Ministry of Justice would partake in such verification procedures.

Another reason to criticize this imbalance is the nuanced definition of qualifications *vis-à-vis* licensing adopted in the aftermath of the Uruguay Round. Licensing requirements are defined as ‘substantive requirements, *other than* qualification requirements’. Hence a requirement relates to licensing only to the extent that it does not relate to qualifications. The aforementioned imbalance would create an incentive for the responding party to ‘name’ all requirements as being qualifications rather than licensing requirements to avoid the administrative burden of an obligation to create impartial and independent authorities. Recall here that while juridical persons are subject to licensing requirements only, natural persons can be subject to both licensing and qualifications requirements. Therefore, the latter may be subject to unjustifiable restrictions, which could potentially dissuade them from offering their services. This can potentially create an unjustified imbalance to the detriment of natural persons.

Of course, a possible rationale behind the requirement of establishing impartial and operationally independent authorities relates to the legacy of regulating network industries where typically a licence is warranted in order to be able to supply a given service. Even so, however, this fails to explain why authorities verifying qualifications should not be equally required to be impartial and operationally independent. As it is, the Draft unduly confounds terms and situations and leaves plenty of room for misinterpretations and sophisticated legalistic creativity that can have harmful effects on the expansion of trade in services. Members would be well-advised here to opt for simplification and leveling of the playing field as regards qualifications *versus* licensing. An additional element to consider is the utility of having different definitions and categorizations for licensing and qualifications. For the sake of comparison, the EU Services Directive avoids leaving too much room for misleading interpretations by adopting a sweeping definition of the terms ‘requirement’ and ‘authorization scheme’.⁶²

3.2.4 *Technical standards*

Regarding technical standards, the Draft echoes Article 2.4 TBT, but differs from it in that Members are required to *take into account* (rather than *use*) relevant international standards (or parts thereof) as a basis for their technical standards, unless they constitute ineffective or inappropriate means for achieving the public policy objective pursued. GATS negotiators are wary of accepting an obligation which would be as strong as the one contained in Article 2.4 TBT. This cautious approach seems to have certain advantages, notably when one takes into account the lack of representativeness and thus legitimacy that may characterize the

DSR 2001:V, 1779, paras. 11.91, 11.100. For a similar case in the EU see Case C-250/03, *Mauri* [2005] ECR I-1267.

62 See Article 4:6 and 4:7 as well as Recital 39 of the EU Services Directive.

processes that lead to the adoption of certain international standards. On the other hand, however, this stance creates a precarious vicious circle in that Members do not have any incentive to partake seriously and actively in international standard-setting efforts.

In *EC–Sardines*, the Appellate Body spelt out the scope of Article 2.4 TBT. First, it agreed with the Panel that a standard is relevant when ‘it has a bearing upon, relates to or is pertinent to’ the contested measure. It further found that a given measure cannot be considered to be using an international standard as a basis if the content of that measure contradicts it. Rather, the relevant international standard should be used ‘as the principal constituent or fundamental principle for the purpose of enacting the domestic measure, alluding to a very strong and close relationship between the two’.⁶³ Furthermore, the Appellate Body underscored that it is for the *complainant* to adduce evidence demonstrating the effectiveness and appropriateness of the international standard at issue.⁶⁴ This position is counter-intuitive: the Appellate Body was hard-pressed in its attempt to reject the argument that the complainant is the informed party in such a case and therefore better-suited to adduce evidence against the appropriateness of a given international standard. This preference for the wording adopted in TBT over that adopted in SPS is yet another element demonstrating Members’ willingness to make the task of the complaining party in establishing a *prima facie* case even more difficult.

Additionally, the Draft incorporates a best-effort provision encouraging Members to ensure maximum transparency when non-governmental bodies develop and apply domestic or international standards. Similar provisions, albeit with a stronger ‘bite’, are included in Articles 3.1 TBT and 13 SPS. Non-governmental bodies can play a decisive role, as several services sectors are self-regulated by non-governmental bodies. Delegation of public power to private parties upgrades the role of the latter regarding market access and supply of a given service. Therefore, close monitoring and transparency of their activities can allow for objective and accelerated entry into a profession or industry, while preserving and enhancing the desired level of quality of the service supplied. Members could be even bolder in this regard and adopt principles that non-governmental bodies should abide by. For this, they could get inspiration from the TBT Code of Good Practice.

This provision on the development of standards alludes to the ever-increasing role of non-state actors in this field. The fact that such standards were mostly of a voluntary nature led many to believe that the impact of these activities is minimal. However, notably, after the adoption of the TBT and SPS Agreements, which create an obligation for WTO Members to use international standards and a presumption of WTO-consistency for those Members adopting such standards, standard-setting activities by non-governmental bodies have taken centre stage.

⁶³ Appellate Body Report, *European Communities – Trade Description of Sardines (EC–Sardines)*, WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3359, paras. 240–5

⁶⁴ *Ibid.*, paras. 275, 282, 287.

While non-binding, standardization processes resemble lawmaking. As their role in determining the very access to markets becomes more prominent as a result of globalised markets and the concomitant collapse of the rigid public versus private divide,⁶⁵ demands for improvements in the efficiency, transparency, legitimacy, and accountability of standardization bodies have grown in prominence.⁶⁶

3.2.5 *Institutional perspectives*

The Draft creates a Committee on Domestic Regulation which will be supervising the implementation of the disciplines. Nevertheless, a serious weakness of the institutional part of the Draft is that it neither requires nor formalizes close cooperation or mutual assistance between national regulators of services industries. For several categories of service suppliers, establishing a type of cooperation (even if only loose, initially) would allow for more effective supervision of service activities globally. For instance, assessment of qualifications could be undertaken more efficiently if a type of network was in place that would allow communication and exchange of information between the authority in charge of assessing qualifications in the host country and the authority that emitted the document certifying qualifications in the home country. In this respect, the WTO Secretariat could maintain a repository of the domestic competent authorities for all the subjects relating to licensing, qualifications, or technical standards. Members would be required to notify such information to the Secretariat, which would store all this information electronically to allow for expedited identification of the relevant counterparts in other Members.

3.3 *The development dimension of the draft disciplines on domestic regulation – missing another opportunity?*

The Draft includes several development-friendly provisions such as phased-in periods for developing countries, the duration of which remains to be decided, and the obligation to provide technical assistance to developing countries and LDCs. Both the administrative burden and the lack of the necessary regulatory capacities make such provisions indispensable. However, it is doubtful whether exempting the LDCs from applying the rules on domestic regulation described above constitutes an approach which is commensurate with the developmental needs of these countries and conducive to the development of their service industries.⁶⁷ Instead of creating concrete incentives for these countries to improve their regulatory and institutional frameworks governing the supply of services domestically and for developed countries to assist in this effort, the Draft merely adopts a purportedly respectful but static stance that will have dubious benefits in the long run.

⁶⁵ See, generally, C. Cutler, *Private Power and Global Authority – Transnational Merchant Law and the Global Political Economy* (Cambridge University Press, 2003).

⁶⁶ H. Schepel, *The Constitution of Private Governance* (Hart Publishing, 2005).

⁶⁷ See, along these lines, R. Adlung, 'Services Liberalization from a WTO/GATS Perspective: In Search of Volunteers', WTO Staff Working Paper ERSD-2009-05, 2009, p. 18.

The development provisions of the Draft recognize the importance of international standard-setting for increased market access especially in developed-country markets, technology transfer, and increased trade. This is not unrelated to the experience from the implementation of the TBT and SPS Agreements. Thus, the Draft requires that developed country Members, when they design their technical assistance programmes directed towards developing countries and LDCs, assist in the establishment of technical standards by such countries, but also that they facilitate the participation of these Members in the relevant international standard-setting organizations. Thus, *à la* Articles 11.2 TBT and 10.4 SPS, the Draft alludes to the usefulness of well-intentioned standardization that reflects the interests and views of a broader group of countries and thus can be considered as sufficiently legitimate.

The previous discussion reveals once more the close links of the adoption of the Article VI:4 regulatory disciplines with the expansion of trade through mode 4. Qualification or licensing requirements and procedures that ensure objectivity, transparency, and impartiality; promote administrative simplification and the expedited clearance of applications; and that prevent fees being set at prohibitive levels constitute essential prerequisites for any further increase in international labour flows.⁶⁸ However, as emphasized earlier, there are several instances where the Draft appears to offer conditions under licensing procedures that are more favourable than qualification procedures. For instance, while in both cases Members are encouraged to accept certified copies instead of original documents,⁶⁹ the Draft recognizes the efficiency of allowing electronic applications only for those relating to licensing. This red-tape-avoidance requirement is equally important in the case of verification of qualifications and therefore should also apply to domestic procedures relating to the evaluation of qualifications. Currently, several countries are in the process of further simplifying their legislation and reducing unnecessary bureaucracy. For instance, the EU has pursued a strategy that aims at the identification of overlaps, gaps, inconsistencies, obsolete measures, and the potential for reducing regulatory burdens, regardless of whether applications of natural or legal persons are at stake.⁷⁰ While mainly driven by domestic forces, such initiatives have a positive spillover on foreign suppliers seeking access to those markets.

68 See S. Chaudhuri, A. Mattoo, and R. Self, 'Moving People to Deliver Services: How can the WTO help?', *Journal of World Trade*, 38(3) (2004), 365.

69 At the EU level, the ECJ has consistently found that requiring original documentation from applicants is disproportionate to the objective pursued relating to the protection of the public interest that service suppliers indeed have certain qualifications attested by a recognized diploma, and that other forms of evidence which are less burdensome such as certified copies or even simple copies can allow the attainment of the public policy objective. See C-298/99, *Commission v Italy* [2002] ECR I-3129, paras 37–39.

70 See Protocol No. 2 on the application of the principles of subsidiarity and proportionality, annexed to the Treaty on the Functioning of the European Union (TFEU); also European Commission (2009), 'Third strategic review of Better Regulation in the European Union', COM(2009)15 final.

Overall, the draft disciplines on domestic regulation are a critical, tentative step towards ‘good’ regulation, as they promote good governance. The Draft attempts to codify in a single text the proposals that have been submitted by Members. Nevertheless, it seems not to be taking account of the most ambitious proposals submitted and this has raised considerable controversy within the WPDR as to whether the text is balanced overall.⁷¹ The Draft can certainly be improved along the lines we suggested earlier. On the other hand, the Draft can be development-friendly in a more active manner. Whereas implementation of the draft disciplines will be a critical challenge for developing countries, regulatory cooperation and information exchange as well as technical assistance at an inter-state level becomes paramount, notably when implementation is compromised by information deficits, ignorance, or collective action problems.⁷² A streamlined approach is all the more necessary for those countries whose constitutional and administrative law tradition may not include this type of sophisticated procedure and this level of openness.

4. A proposal for a necessity test applicable to all services sectors

In the case of origin-neutral measures, the quest for a balance between the competing rights of expanding multilateral trade in services, on the one hand, and avoiding any circumvention of market access commitments and GATS substantive obligations, on the other, can only be successful if proxies are developed which the WTO adjudicator can use.⁷³ In the GATS, vernacular so-called ‘necessity tests’ have long been used in other WTO agreements as the prevailing benchmarks for identifying and disciplining unduly burdensome or protectionist regulatory behavior.⁷⁴ Because Article VI:4 seeks the creation of disciplines ensuring that the covered measures do not constitute *unnecessary* barriers to trade in services, the creation of a horizontal necessity test lies at the heart of this mandate.⁷⁵ Thus, a textual interpretation of the mandate contemplated by Article VI:4 already hints at the need to agree on what would be *unnecessarily* restrictive of trade in services; in other words, a necessity test. Such a test would allow the attenuation of the most egregious requirements and procedures entrenched in domestic regulatory regimes and, in the medium-to-long term, would lead to extensive recognition of foreign qualifications, licensing, or standards, since domestic

⁷¹ See WTO, WPDR, above n 13.

⁷² W. Mattli and T. Bütte, ‘Global Private Governance: Lessons from a National Model of Setting Standards in Accounting’, *Law and Contemporary Problems*, 68 (2005), 226–227.

⁷³ Also P. Delimatsis, ‘Determining the Necessity of Domestic Regulations in Services – The Best is Yet to Come’, *European Journal of International Law*, 19(2) (2008), 365.

⁷⁴ Also M. Krajewski, ‘Article VI GATS (Domestic Regulation)’, in R. Wolfrum, P.-T. Stoll, and C. Feinäugle (eds.), above n. 37, p. 178.

⁷⁵ A positive analysis of the mandate and a critical review of the concept of necessity, its interpretation by the WTO judiciary, and the relevant doctrine is offered in Delimatsis, above n. 73. In this section, we rather focus on a *normative* analysis of a possible framework that endorses a necessity test applicable to all services sectors.

authorities will be called upon to compare the equivalence of foreign requirements or processes.⁷⁶

To avoid judicial activism⁷⁷ and interpretive loans from other WTO agreements which may not be apposite in the context of services, it is submitted that Members should consider the adoption of a horizontally applicable necessity test that would be clear, effective, and operationally useful. Surely, such a test would include several concepts that accommodate the domestic demands for regulatory flexibility. While constructive ambiguity has traditionally been deemed beneficial and allowed agreement to be reached among Members,⁷⁸ in this case, it can jeopardize the long-term viability of the regulatory disciplines and therefore intensive endeavours to clarify *ex ante* the content of necessity in services can be essential.

It is argued that a necessity test drafted along the following lines could enjoy a 'critical mass' of support:

In sectors where specific commitments are undertaken, Members shall ensure that measures relating to qualification requirements and procedures, licensing requirements and procedures and technical standards are not prepared, adopted, applied, or administered with a view to creating unnecessary barriers to trade in services. For this purpose, Members shall ensure that these measures are (a) based on objective and transparent criteria, such as competence and the ability to supply a service; (b) not more trade-restrictive than necessary to fulfil a national policy objective,* including ensuring the quality of the service; and (c) in the case of licensing and qualification procedures, not in themselves a restriction on the supply of the service.

Members shall endeavour to ensure that measures relating to qualification requirements and procedures, licensing requirements and procedures and technical standards in sectors where commitments have not been undertaken do not constitute unnecessary barriers to trade in services.

* A measure falling under this provision cannot be considered more trade-restrictive than necessary, unless there is another, reasonably available alternative measure that would equally attain the objective pursued and which is significantly less trade-restrictive. When evaluating the reasonable availability of an alternative measure, Panels shall take into account several factors such as economic and technical feasibility, the associated risks, or the creation of any undue burden to the regulating Member, including prohibitive costs, substantial administrative resources, costly technologies, or advanced know-how.

⁷⁶ Recognition has here a broad meaning to also incorporate cases where requirements and procedures or standards, while different, are considered as equivalent because they equally achieve the desired level of protection or ensure the quality of the service supplied.

⁷⁷ For a study suggesting that a shift of regulatory authority is occurring within the WTO to the benefit of the judicial branch, see J. Goldstein and R. Steinberg, 'Regulatory Shift: The Rise of Judicial Liberalization at the WTO', UCLA Law and Economics Research Paper No. 07-15, 2007.

⁷⁸ Cf. Panel Report, *Mexico – Measures Affecting Telecommunications Services (Mexico–Telecoms)*, WT/DS204/R, adopted 1 June 2004, DSR 2004:IV, 1537, para. 7.3.

The proposed test adopts an open-ended list of legitimate objectives, including ensuring the quality of the service delivered, which a Member may want to pursue. In this test, the covered measures should not aim to unduly hamper trade in services, starting from the stage at which they are prepared and up to the stage of application or administration. Nevertheless, contrary to the necessity test adopted in the draft accountancy disciplines,⁷⁹ the proposed necessity test, which is meant to be generally applicable, does not cover the *effects* of the covered measures.

Traditionally, GATT/WTO law is not concerned with trade effects in that no evidence on this score is required for a violation of a WTO provision to be established.⁸⁰ Furthermore, the ‘aims and effects’ doctrine that was developed in the GATT years⁸¹ was not endorsed by the Appellate Body in the WTO years, as exemplified by *US–Gasoline* and *EC–Bananas III*. Instead, the WTO judiciary has advanced the concept of ‘protective application’, which focuses on the design, architecture, and revealing structure of a measure.⁸² In the proposed necessity test, a proper identification of protectionist intent (‘with a view to’) would also warrant a thorough scrutiny of the design, architecture, and structure of the measure.

In the proposed necessity test, the quest for alternatives is intentionally ‘managed’ to allow for a certain room for manoeuvre for the regulators and allay their concern of conceding regulatory autonomy.⁸³ Indeed, the proposed interpretive footnote aims to qualify or narrow the pool of measures that can be regarded as alternatives and combines previous WTO rulings on necessity, notably the Appellate Body’s findings in *EC – Asbestos*,⁸⁴ *US – Gambling*,⁸⁵ and

79 WTO, Trade in Services, above n. 16, para. 2.

80 Appellate Body Report, *Japan – Taxes on Alcoholic Beverages (Japan–Alcoholic Beverages II)*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97, p. 16; also GATT Panel Report, *United States – Taxes on Petroleum and Certain Imported Substances (US–Superfund)*, L/6175, adopted 17 June 1987, BISD 34S/136, para. 5.2.2.

81 GATT Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages (US–Malt Beverages)*, DS23/R, adopted 19 June 1992, BISD 39S/206; GATT Panel Report, *United States – Taxes on Automobiles*, DS31/R, 11 October 1994, unadopted. See also R. Hudec, ‘GATT/WTO Constraints on National Regulation: Requiem for an “Aim and Effects” Test’, *International Lawyer*, 619 (1998), at 626.

82 This was regarded as leading to a resurrection of the aims and effects test. See A. Porges and J. Trachtman, ‘Robert Hudec and Domestic Regulation: The Resurrection of “Aim and Effects”’, *Journal of World Trade*, 4 (2003), 783; also E. Leroux, ‘Eleven Years of GATS Case Law: What Have we Learned?’, *Journal of International Economic Law*, 10(4) (2007), 749, at 780.

83 Cf. J. Trachtman, ‘Lessons for the GATS from Existing WTO Rules on Domestic Regulation’, in A. Mattoo and P. Sauvé (eds.), *Domestic Regulation and Service Trade Liberalization* (World Bank/Oxford University Press, 2003), pp. 68–69.

84 Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (EC–Asbestos)*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243, para. 174.

85 Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes (Dominical Republic–Import and Sale of Cigarettes)*, WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, 7367, para. 70.

Brazil – Tyres.⁸⁶ It bears mention that the inclusion of this necessity test would not affect the development-friendly provisions described above, such as phase-in periods for the application of the disciplines to developing countries or the exemption for LDCs. As noted earlier, however, the forthcoming disciplines, and the application of the principle of necessity in particular, can lead to the improvement of the efficiency and trade-responsiveness of any domestic regulatory framework.

In addition, Members could contemplate the possibility of adopting an interpretive rule, suggesting that the existence of doubt concerning the availability or effectiveness of a less-trade-restrictive and reasonably available measure should benefit the respondent in accordance with the maxim *in dubio mitius*. Although such a statement seems already to be reflected in the WTO case-law, Members, especially those which regard the inclusion of a necessity test with suspicion, may consider as a relief the introduction of such a rule to the forthcoming disciplines.

As it stands, the Draft is unbalanced in that it focuses mainly on the procedural aspects of the Article VI:4 mandate, but it neglects the equally important and clear substantive aspect of the mandate enshrined in Article VI:4(b) GATS. Hence, not incorporating a necessity test in the future disciplines under Article VI:4 would go against the letter and spirit of the Members' legal mandate.⁸⁷ More crucially, however, it would cast doubt on the effective enforcement of the prospective disciplines in the future. In the absence of a necessity test, the WTO adjudicator, when called upon to rule over the consistency of a domestic regulation measure with the disciplines, could use its own benchmarks or a sort of test based on the principle of necessity, since the latter principle will be creeping into the disciplines anyway, as we discuss in the next section. This, nonetheless, would mean that Members have missed the unique opportunity to design themselves a necessity test that would encompass concepts and elements that allow for more flexibility when regulating.

Another fact which strongly calls for the adoption of a precise, effective, and enforceable necessity test is that the WTO adjudicator will read all applicable GATS provisions, i.e. both Article VI:4 as it stands and the new disciplines in a way that gives meaning to all of them harmoniously, in accordance with the fundamental principle of effectiveness.⁸⁸ Disregarding the utmost objective of the legal mandate enshrined in Article VI:4, which is to ensure that measures relating to LRP, QRP, and TS do not constitute 'unnecessary

⁸⁶ Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres (Brazil–Retreaded Tyres)*, WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, 1527, paras. 156, 171, 174–5.

⁸⁷ In this direction, see Australia's intervention in WTO, WPDR, 'Report of the Meeting held on 19 and 20 June 2006', S/WPDR/M/35, 14 August 2006, paras. 7–8, and Switzerland's position in WTO, WPDR, above n. 13, para. 10.

⁸⁸ Cf. Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear (Argentina–Footwear (EC))*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515, para. 81; Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products (Korea–Dairy)*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3, para. 81.

barriers to trade in services', would amount to an interpretation that reduces parts of the GATS to 'redundancy or inutility',⁸⁹ contrary to the principle of *effet utile* to which the WTO adjudicator adheres. At a minimum, Article VI:4 in its current form would be considered as context when interpreting the regulatory disciplines.⁹⁰ Can such a constellation be considered as judicial activism? The question should be answered in the negative. Already the first paragraph of the Draft provides that Members have agreed on regulatory disciplines 'pursuant to Article VI:4 of the GATS'. This means that the Draft actually hints at the interpretation by the WTO adjudicating bodies of the regulatory disciplines in the aforementioned manner. Therefore, it appears that necessity will form part of the interpretive tools in the toolbox of the WTO adjudicator regarding measures falling under Article VI:4, *regardless* of whether the disciplines incorporate a necessity test.

5. The unavoidable adoption of a necessity test

For various Members, including the United States, Brazil, and several developing countries and LDCs, the inclusion of a necessity test in the draft disciplines on domestic regulation appears to be regarded as a deal breaker. Due to these objections to the application of the principle of necessity across services sectors, the most recent Draft replaces the requirement that measures be 'not more burdensome than necessary' to ensure the quality of a service with the requirement that the covered measures should not constitute 'disguised restrictions on trade in services'. Furthermore, these measures should be 'relevant to the supply of the services to which they apply'. Thus the necessity test has been replaced by a 'disguised trade restriction' test and a 'relevance' test. We analyse each of these two types of tests in turn.

The 'disguised trade restriction' test is reminiscent of the language (and the test) of the chapeau of Articles XX GATT and XIV GATS.⁹¹ Consistent GATT/WTO case-law suggests that the concept of a 'disguised restriction to trade' has been associated with discrimination and the manner in which a certain measure is *applied* or *administered*.⁹² In *US-Gasoline*, the Appellate Body emphasized that concealed or unannounced restriction does not exhaust the term 'disguised trade

89 Cf. Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products (Canada–Dairy)*, WT/DS103/AB/R, WT/DS113/AB/R and Corr.1, adopted 27 October 1999, DSR 1999:V, 2057, para. 133; Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000 (US–Offset Act (Byrd Amendment))*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, DSR 2003:I, 375, para. 271.

90 The same applies to the role of Article VI:5 GATS.

91 Similar tests are to be found in Articles 2.3 and 5.5 SPS or VII:3 GATS.

92 Cf. the chapeau of Article XIV GATS or para. 5(d) of the Telecoms Annex; also T. Cottier, P. Delimatsis, and N. Diebold, 'Article XIV', in Wolfrum, Stoll, and Feinäugle (eds.), above n. 37, p. 325.

restriction'.⁹³ This term clearly includes disguised discrimination and it can be read as also encompassing restrictions resulting in arbitrary or unjustifiable discrimination. However, WTO case-law also suggests that disguised trade restriction can exist even where there is no discrimination. This seems to be the intent of the WPDR negotiators who advance this language, i.e. to cover measures which, while *not* discriminating *de jure* or *de facto*, still constitute disguised trade restrictions, that is restrictions that are not merely inadvertent or unavoidable, but rather foreseeable violations of WTO obligations.⁹⁴ The choice of this term will inevitably lead the WTO adjudicator to interpret it according to previous WTO case-law, which classified as disguised trade restrictions several acts or omissions, such as the treatment of similarly situated trading partners in a different manner; the lack of serious, good faith consultations with other trading partners (or, alternatively, with some of them, but not others) to find a commonly agreed solution; or the fact that significant costs that are only incumbent on the exporters are not taken into account when regulating, while the costs that domestic producers bear are. Hence, just as with the application of a necessity test, under the new 'disguised trade restriction' test, the pursuit of less trade-restrictive alternatives and the comparison of regulatory conduct in similar situations will be important evidence for the WTO adjudicator. Therefore, the proposed test in its application will be interpreted as a sort of necessity test.

By the same token, a 'relevance' test would be construed as a 'soft' necessity test. An interpretation along the lines of the *US-Shrimp* case law regarding Article XX(g) seems plausible. This means that the measures adopted need not be necessary, but they should be at least directly connected with, or primarily aimed at, the objective pursued and this connection should be a close and real one.⁹⁵ This test would again operate similarly to a necessity test, notably if we consider the judicial restraint in cases involving objectives of vital importance and the description of necessity as a continuum in *Korea-Beef*.⁹⁶

In sum, it is submitted that these two tests that were aimed at replacing the unjustifiably tarnished necessity test may still be interpreted through recourse to concepts that are inherently associated with the principle of necessity under the GATT/WTO. Therefore, instead of denying the need for the inclusion of a necessity test in the forthcoming rules harnessing domestic regulations, negotiators may want to concentrate their efforts on finding the best recipe for a wording that will gather broad support.

⁹³ Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline (US-Gasoline)*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3, p. 25.

⁹⁴ *Ibid.*, p. 28.

⁹⁵ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (US-Shrimp)*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755, paras. 136, 141.

⁹⁶ Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef (Korea-Beef)*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, 5, para. 161.

6. Practical issues relating to the draft disciplines on domestic regulation

6.1 *Legal nature of the disciplines*

Members have yet to decide on the most appropriate way to incorporate the disciplines in the GATS. If Members choose the option of an Annex, a slight, but still consensus-based amendment of the GATS would probably be necessary. This amendment would, *inter alia*, include an agreement on the future of Article VI:5 in the post-Doha era. While Article VI:5(a), alias the transitional substantive provision of Article VI, could easily be deleted, a similar solution would not be suitable for Article VI:5(b) referring to international standards. The Draft, as it stands, only covers technical standards and thus cannot be regarded as incorporating Article VI:5(b). It seems reasonable that Members start considering the possibility of including a new paragraph in the disciplines, most appropriately under the section on 'General Provisions' which would incorporate Article VI:5(b). This would allow a broader discussion among Members with respect to the appropriate role of international standards when examining the necessity of a given measure. Recall that the GATS, when compared to the TBT and SPS, adopts a much 'softer' stance *vis-à-vis* international standards. The Annex, just like the other GATS Annexes, would form an integral part of the GATS by virtue of Article XXIX GATS. The option of a reference paper which would require Members to make positive commitments under the additional commitments column of their Schedules would not ensure a uniform application of the disciplines and should rather not be considered as a meaningful option.

6.2 *Justiciability and enforcement*

Through Article VI and the completion of the mandate contemplated by paragraph 4, the GATS creates multilaterally established private rights against domestic administrators and regulators and adds a multilateral layer of scrutiny regarding the adherence of the competent authorities to the rule of law and due process in a non-discriminatory manner.⁹⁷ This is yet another example of the changing patterns in international law and its effects on domestic rule-making and is revealing of a trend towards increasing regulatory cooperation or even convergence.⁹⁸ These newly created private rights have to be protected and a multilateral scrutiny may be too time-consuming or technically difficult to undertake. To avoid the draft disciplines becoming dead letter, Members have to ensure that their regulators and judicial or other review organs abide by the draft disciplines when they regulate or when a service supplier has recourse to those organs, respectively.

As to judicial review in particular, it is argued that the requirement of Article VI:2 GATS regarding the creation of prompt review mechanisms is not

⁹⁷ Delimatsis, above n. 14, p. 34.

⁹⁸ See, generally, Kingsbury, Krisch, and Stewart, above n. 35.

sufficient. Rather, Members would be well-advised to agree on a provision (or set of provisions) that allows for the possibility of negatively affected service suppliers directly invoking before national courts their rights stemming from the disciplines. Such a supplier-oriented approach⁹⁹ would appear as going against the current view that, generally, the WTO agreements are not recognized by national courts as producing direct effect in domestic legal orders.¹⁰⁰ In the EU, for instance, settled case-law suggests that the nature and economy of these agreements prevents the ECJ from examining the legality of EU acts based on the rules included in these agreements and thus no rights are thereby conferred to private parties.¹⁰¹ However, in this specific case, and due to the peculiar nature of future complaints, Members should consider this option if the forthcoming disciplines are to have any meaningful effects and really facilitate the everyday operation of service suppliers worldwide. The problem appears more acute with respect to natural persons. To better illustrate this, consider the case of individuals or natural persons negatively affected by the disrespect of their rights by the host State who will most probably be unable to convince their government to file a complaint before the WTO due to the insignificant economic rents.

What also seems worthy of reflection is why matching the sophisticated level of detail set out in Part III of the TRIPS Agreement does not make sense in the case of the draft disciplines on domestic regulation under GATS. For instance, the procedural rights contemplated by Articles 41:2 and 3 or 42 TRIPS are also incorporated in the Draft, albeit not articulated in a similarly powerful manner. TRIPS and enforcement of intellectual property rights seems to offer a useful model in the quest for strong enforcement mechanisms in the case of the forthcoming disciplines governing domestic regulations in services.

Taking again the example of the EU, it bears mention that the ECJ has been more lenient when an issue relating to intellectual property rights and the TRIPS Agreement is raised before the Court. For instance, in *Hermès International*, the ECJ found that the national courts within the EU are obliged to apply national rules relating to provisional measures for the protection of intellectual property rights *in the light* of the text and the finality of the TRIPS and not only in the light

99 A similar point, although in a broader international law context, is made by Judge Simma, who argues for effective judicial review to protect individuals. See B. Simma, 'Universality of International Law from the Perspective of a Practitioner', *European Journal of International Law*, 20(2) (2009), 265, at 296; also E.-U. Petersmann, 'Multilevel Judicial Governance of International Trade Requires a Common Conception of Rule of Law and Justice', *Journal of International Economic Law*, 10(3) (2007), 529.

100 J. Jackson, 'Direct Effect of Treaties in the US and the EU, the Case of the WTO: Some Perceptions and Proposals', in A. Arnull, P. Eeckhout, and T. Tridimas (eds.), *Continuity and Change in EU Law* (Oxford University Press, 2008), p. 361.

101 See, *inter alia*, C-149/96, *Portugal v Council* [1999] I-8395, paras. 47–49, and more recently, C-351/04, *Ikea Wholesale* [2007] ECR I-7723, paras. 29–30. The ECJ accepted direct effect only in two concrete cases, that is when, by adopting a given Community act, the Community aims to execute a particular obligation taken under the WTO (C-69/89, *Nakajima* [1991] ECR I-2069, 27–31) or the Community act explicitly refers to concrete provisions of any WTO agreement (70/87, *Fediol* [1989] ECR 1781, 19–22).

of the EU legislation at issue.¹⁰² More interestingly, in *Merck*, the ECJ found that, in cases where the EU has *not* exercised its competences – or, at least, to a sufficient extent – in a given field (in the case at issue, the minimum duration of patent protection), a national legal order and its courts can accept the direct effect of a given TRIPS provision and thus give private parties the right to invoke that provision directly.¹⁰³ Again, the ECJ merely allows for a TRIPS-consistent (if possible) application in cases where Community legislation already exists.¹⁰⁴ Despite the last statement, however, it appears that under certain circumstances, the ECJ would not outlaw the recognition of direct effect of a multilateral obligation at the national level.

Another option which may enhance the possibilities of apposite enforcement of the forthcoming disciplines is the establishment of a complaint mechanism within the new Committee on Domestic Regulation, empowering private parties to notify to that Committee the regulatory barriers they have encountered. Similarly, the Trade Policy Review Mechanism (TPRM) could also be used as a means of exercising pressure to recalcitrating governments. While this appears to be useful, as it would allow governments to pinpoint violations of the disciplines and to raise this in their consultations with other governments, the main weakness of the TPRM is the periodicity of reviews, which is contingent on the shares of world trade of the countries being reviewed. Thus, the big developed economies are reviewed every two years, while smaller economies are reviewed less frequently (4–6 years). It follows that such ‘name and shame’ strategies may have limited chances of success, notably when they are not accompanied by an effective mechanism that will examine the consistency of certain measures and practices with the disciplines on domestic regulation.

A similar, albeit possibly more promising option is to establish a complaint mechanism at the national level, e.g. within the one-stop-shop dealing with applications, that will receive complaints made by service suppliers and which will be notified and monitored by the Committee on Domestic Regulation. Under this option, Members could consider allowing private parties to directly refer to the multilateral disciplines and describe how the rights conferred to them were violated at the domestic level.

102 C-53/96, *Hermès International* [1998] ECR I-3603, paras. 25–29; also C-260/08, *HEKO Industrieerzeugnisse GmbH*, nyr, para 22.

103 C-431/05, *Merck Genéricos Produtos Farmacêuticos* [2007] ECR I-7001, paras. 34, 46, 48. Established ECJ case-law suggests that a provision should be considered as being directly applicable ‘when, regard being had to the wording, purpose and nature of the agreement, it may be concluded that the provision contains a clear, precise and unconditional obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure’. See C-392/98, *Dior and Others* [2000] ECR I-11307, para. 42.

104 Ibid, para. 47; also C-431/05, *Merck Genéricos Produtos Farmacêuticos*, para. 35. This is in line with the broader principle of treaty-consistent interpretation within the EU. See M. Bronckers, ‘From “Direct Effect” to “Muted Dialogue” – Recent Developments in the European Courts’ Case Law on the WTO and Beyond’, *Journal of International Economic Law*, 11(4) (2008), 888.

These are only a few of the options that Members may consider to avoid rendering the forthcoming disciplines unenforceable. It would be erroneous to take the proper application and enforcement of the disciplines for granted. In a multi-lateral trading system, which is traditionally based on State-to-State resolution of disputes, low-level private-to-State disputes may not find their way to the WTO adjudication system unless alternative routes are offered to these private parties to enforce their rights or seek remedies for administrative decisions, which may adversely affect their interests. It is contended here that Members should consider these possible options before concluding their negotiations on domestic regulation in the current Round to give full meaning to the disciplines and allow for their proper enforcement at the national level.

7. Concluding remarks

Liberalization of trade in services is only useful when it goes hand in hand with the promotion of sound domestic regulation. The Draft goes toward this direction, but there is important scope for improvement, particularly with respect to the substantive obligations of the disciplines. For it is erroneous to believe that sound regulation only entails transparent and objective procedures. The substance of the domestic regulation is crucial, as it can neutralize any market access concessions.

In view of the critical turn that the GATS negotiations on the creation of rules governing domestic regulations have taken, this paper attempted to draw the attention of negotiators to several essential issues which have to be carefully considered before the end of these negotiations on domestic regulation. It identified several shortcomings of the draft disciplines in their current form and put forward various proposals which may improve the efficacy of the disciplines and allow for a more satisfactory and expedited enforcement at the national level of the procedural rights created at the multilateral level. The paper makes a strong case for the inclusion in these disciplines of a necessity test applicable across services sectors. It goes on to advance a concrete wording which may enjoy a critical mass of support. GATT and WTO tradition has confirmed that necessity and transparency are key proxies for drawing the fine line between legitimate regulatory interference and disguised protectionism. At the risk of stating the obvious from a good governance perspective, operational regulatory disciplines that embody a necessity test and strong transparency disciplines are in the interest of all Members and would facilitate the expansion of international trade in services when implemented.

In addition, and from a dispute resolution perspective, notably when interpreting non-discriminatory measures, the import of such protectionism-revelation proxies is beyond doubt. The absence of a horizontally (i.e. across sectors) applicable necessity test would render any regulatory disciplines on domestic regulation of limited value, for no benchmark would be available to the WTO adjudicator against which to judge the challenged measures. Worse, the use of other tests may

still lead to their interpretation as a sort of a soft necessity test, the content of which will be specified by the WTO adjudicating bodies. Therefore, to avoid undesirable judicial interpretations, Members should reconsider the value of *ex ante* completing the contract by adopting a straightforward necessity test with commonly agreed caveats.¹⁰⁵

The current negotiations constitute a unique opportunity to create a meaningful and operational set of rules to improve domestic regulations governing service supply worldwide. Negotiations at the horizontal level have advanced admirably smoothly. However, allowing this set of rules to remain incomplete reduces the likelihood of the situation being remedied in the future due to the considerable transaction costs that negotiations of this type entail. This situation exemplifies the need under certain circumstances to be sufficiently courageous and propitious to elaborate on certain aspects of the disciplines on domestic regulation before the end of this Round.

In addition, the prospects for a deal in this area at the multilateral level have never been better. This is evident from the myriad PTAs that accept the superiority of the negotiations at the multilateral level and pledge to transpose the results of these negotiations, once they are finalized, to their bilateral deals. Regardless of whether they adopt a negative or positive list approach, all PTAs outsource, explicitly or implicitly, the development of such disciplines at the multilateral level. Thus, in this specific area, Members strive for coherence by favouring multilateral negotiations that would lead to the creation of minimum standards or rights of private parties in their capacity as service suppliers. In an era of growing fragmentation of international trade regulation, domestic regulation is the expression of Members' willingness to achieve coherence when it comes to the arguably most important category of measures affecting trade in services. Thus, along with the mandate included in Article VI:4 GATS, there is another set of mandates contemplated by these PTAs, which constitutes a sort of *carte blanche* in favour of the negotiators at the multilateral level.

This is also revealing of the level of responsibility that the GATS negotiators bear. Creating enforceable rules on domestic regulation and translating Article VI:4 into operational and meaningful obligations has proven to be particularly challenging. More importantly, it has revealed the clear limits of peripheral experimentation in key areas of rule-making (i.e. rules that are not directly related to market access or liberalization outcomes), with increasing deference of the periphery (i.e. PTAs covering services) towards the centre (i.e. the GATS) with regard to solutions to the bulk of the unfinished rule-making agenda in services trade.

105 Being a highly incomplete contract with a high level of legal insecurity, the GATS generally encourages a risk-averse approach from the side of Members, which may be also explaining – partly, at least – the present negotiating deadlock. Cf. B. Hoekman, A. Mattoo, and A. Sapir, 'The Political Economy of Services Trade Liberalization: A Case For International Regulatory Cooperation?', *Oxford Review of Economic Policy*, 23(3) (2007), 367, at 385ff.